

Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence

SARAH ROGERS*

I. INTRODUCTION

Recently, feminist writers have recognized the need to respond to gendered violence “by providing multiple options for survivors [of sexual violence], rather than one single cookie-cutter response.”¹ Rape prosecutions have been notoriously painful experiences for the victims of sexual assault,² leading to reforms such as the Rape Shield Laws in the Federal Rules of Evidence.³ Reforms that address overt gender bias in rape prosecutions have increased victims’ access to the court systems but have done little to increase the reporting and prosecution of rapes to a level that would accurately reflect the actual frequency of rapes in our society.⁴ One hypothesis for the reluctance of rape victims to pursue prosecution of their perpetrators is that the only option for addressing the rape is a full-blown, public prosecution, which may not even address the victim’s actual desire of vindication.⁵ Furthermore, rape prosecutions have a low success rate in preventing

* Juris Doctor Candidate, The Ohio State University Michael E. Moritz College of Law, 2009; B.A., Denison University, 2006. I would like to thank Stephen M. Wolfson for his editing assistance, Lauren Hilsheimer and Kenesa Ahmad for their constant support and friendship, and my parents, William A. Rogers and Sarah B. Rogers for their love, encouragement, and insight.

¹ C. Quince Hopkins & Mary P. Koss, *Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses*, 11 VIOLENCE AGAINST WOMEN 693, 707 (2005).

² See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094–1101 (1986) (discussing how the rape victim’s reputation and *mens rea* is often scrutinized more closely than the actions of the perpetrator, adding to the shame of reliving the event in a public trial).

³ See Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764–70 (1985).

⁴ See, e.g., Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 128–29 (1992).

⁵ See Hopkins & Koss, *supra* note 1, at 694; see generally HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE 1–24 (2002) (discussing how victims are more interested in voicing their position and participating in a restorative, rather than retributive, solution to a crime).

recidivism.⁶ Domestic violence prosecutions are also not as effective as they should be because of the courts' historical tendency to treat the domestic violence relationship as private, and therefore shielded from judicial reach.⁷

Mary P. Koss has begun to study the possibility of applying alternative dispute resolution, or restorative justice, as an alternative to prosecuting crimes of gendered violence.⁸ In fact, Koss has created a restorative justice pilot program, RESTORE, which aims to mediate between victims and offenders involved in rape crimes in order to create a community-based solution to the aftermath of rape.⁹ This process better addresses the needs of the victim and actually deters the perpetrator.¹⁰ However, the use of restorative justice in the complicated context of rape has not escaped the criticisms and concerns of other feminist and mediation scholars.¹¹ The

⁶ Hopkins & Koss, *supra* note 1, at 694.

⁷ MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 263–69 (2nd Ed. 2003); Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2150–70 (1996). Historically, domestic violence was acceptable as long as it was “corporeal,” or used to chastise a woman. *Id.* at 2118. Now, while it is no longer considered acceptable in law or society for a man to beat his wife, the law continues to treat domestic violence differently from other forms of violence. *Id.* The courts are hesitant to intervene in response to domestic violence, because they are reluctant to break the privacy of the marital household. *Id.* Though the law has changed, Siegel calls this kind of change in the rules and rhetoric of a status regime “preservation through transformation,” and illustrates “this modernization dynamic in a case study of domestic assault law as it evolved in rule structure and rationale from a law of marital prerogative to a law of marital privacy.” *Id.* at 2120. For a seminal example of the court’s historical reluctance to intervene in a violent relationship based on notions of privacy of the family see *State v. Rhodes*, 61 N.C. 453 (1868) (acquitting a man for whipping his wife with a stick because the court did not want to interfere with family government); see also Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 46–47 (2000); Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 11 WIS. WOMEN’S L.J. 1, 4 (1996); Elizabeth F. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983–85 (1991).

⁸ See Hopkins & Koss, *supra* note 1, at 696.

⁹ *Id.*

¹⁰ See also Kerry M. Hodak, Note, *Court Sanctioned Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution*, 19 OHIO ST. J. ON DISP. RESOL. 1089, 1113–14 (2004) (describing the benefits of using mediation in cases of acquaintance rape); Deborah Gartzke Goolsby, Note, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1185 (1990) (describing a collection of research on the benefits of using mediation in cases of simple rape).

¹¹ See generally Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 9 (2006) (summarizing the physical

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

danger that gender and racial norms will enter into the mediation process is ever-present because those norms shape the daily interactions of all parties involved.¹² Furthermore, the unique psychological characteristics of the victim-offender relationship may make a face-to-face, intimate meeting between the two parties more damaging than healing.¹³ In keeping with the feminist agenda of expanding options for rape survivors, this note investigates the use of online dispute resolution (ODR) to eliminate some of the feminist concerns with Victim Offender Mediation (VOM) for gendered violence. Although certain positive aspects of the restorative justice system may be lost if mediation takes place online, this new medium may open the possibility of some type of mediation for parties that might otherwise be unable to even address the crime.¹⁴

This note examines how ODR expands remedial options for victims of domestic violence and rape by eliminating some of the major dangers and shortcomings of current mediation practices. ODR also has the potential to eliminate or reduce gender and racial norms that skew mediation and prevent parties from effectively advocating their own interests. First, Part II of this note discusses the inadequacies of traditional prosecution for gendered violence and the ways in which restorative justice is a better alternative for dealing with these crimes. Next, Part III addresses the practical ways in which ODR can provide a safer and more accessible forum for mediation of gendered violence. Finally, Part IV discusses the unique ways in which race and gender can infiltrate the mediation process, especially between a victim and offender, and how ODR provides a forum that can greatly reduce the adverse effects of intersecting norms.

II. GENDER VIOLENCE AND COURT

One reason that rape prosecution is notorious for being a particularly painful process for the victim is that courts historically treated only "stranger rape" as nonconsensual, and essentially placed the burden of proof on the

and psychological dangers of restorative justice in the context of partner, sexual, and family violence).

¹² See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1579–82 (1991); see also Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 751–68 (2000); Howard H. Irving, et al., *Family Mediation and Cultural Diversity: Mediating with Latino Families*, 16 MEDIATION Q. 325, 327–30 (1999).

¹³ See Daly & Stubbs, *supra* note 11, at 17.

¹⁴ Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J. L. 275, 276 (2006).

victim to demonstrate lack of consent in acquaintance and marital rape.¹⁵ Juries are often biased against victims in rape cases based on stereotypes about what constitutes rape, and the victims' appropriate response to the rape.¹⁶ Furthermore, the kind of cross-examination that victims of rape must face in the courtroom, has been termed a "second rape" due to a defense attorney's attempts to "demean or humiliate the victim" in order to exculpate the defendant.¹⁷ Special challenges are placed on rape victims by the burden of proving consent and diverting biases, while "[v]ictims of other crimes need not open their private lives to public scrutiny in order to press their claims."¹⁸ In fact, prosecutors decline to prosecute most rape complaints even when it is contrary to the wishes of the victim.¹⁹ Perhaps due to the failure of the judiciary to take seriously most forms of rape, and the humiliation involved in bringing formal rape charges, most cases of rape in the United States go unreported.²⁰

Feminists attack domestic violence jurisprudence for treating the violence as a private, individual act by a perpetrator, when really the domestic violence relationship involves the entire family system.²¹ Furthermore, the treatment of the domestic violence relationship as private

¹⁵ ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 23 (1999); Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 601 (1991); see, e.g., Estrich, *supra* note 2, at 1092; Henderson, *supra* note 4 at 128-29; Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1104 (1993).

¹⁶ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 172-78 (1989). The courts often draw the line between consent and intercourse by examining a woman's status and reputation, as if male force is normal in response to these factors. *Id.* at 175; see also Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1046-61 (1991) (explaining jurors' acceptance of rape myths that place blame on the victim of rape and create biases against victim testimony).

¹⁷ See Nancy E. Snow, *Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims*, in *A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE*, 245, 255-56 (Keith Burgess-Jackson ed., 1999).

¹⁸ *Id.*

¹⁹ E.g., Hopkins & Koss, *supra* note 1, at 694.

²⁰ *Id.*; see also Henderson, *supra* note 4, at 128-29.

²¹ CHAMALLAS, *supra* note 7, at 255; Isabel Marcus, *Reframing "Domestic Violence": Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 27 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 557 (1999).

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

trivializes and prevents meaningful societal intervention.²² Courts have a tradition of refusing to intervene in the private sphere, based on sexist assumptions about the authoritative nature of the “head” of the household.²³ Whereas the court no longer condones the use of force by a husband, they are often “afforded legal immunity” for violence due to a “discourse of affective privacy, [in which] wives were not forced into submission, but willingly yielded to their husband’s wishes in accord with their more altruistic and virtuous nature.”²⁴ Even today, courts treat domestic violence as separate from other types of violence and use concepts of privacy to describe intervention into marriage as “evil.”²⁵ One scholar describes the abuse of the concept of privacy:

The concept of privacy encourages, reinforces and supports violence against women. Privacy says that violence against women is immune from sanction, that it is permitted, acceptable and part of the basic fabric of American family life. Privacy says that what goes on in the violent relationship should not be the subject of state or community intervention. Privacy says that it is an individual, and not a systemic problem. Privacy operates as a mask for inequality, protecting male violence against women.²⁶

In addition, prosecution of domestic violence is complicated because victims often refrain from participating in prosecution to protect their families.²⁷

The formal, adversarial system for prosecution is based upon a male-dominated model, which takes into account mostly male values and modes of reasoning.²⁸ In *In a Different Voice*, Carol Gilligan argues that women approach problem solving from an “ethic of care,” that is, women seek to optimize relationships with others and choose outcomes that please the most

²² CHAMALLAS, *supra* note 7, at 255–56; Siegel, *supra* note 7, at 2119; *see also* Marcus, *supra* note 21, at 27.

²³ Schneider, *supra* note 7, at 979–86.

²⁴ CHAMALLAS, *supra* note 7, at 265.

²⁵ Siegel, *supra* note 7, at 2157.

²⁶ Schneider, *supra* note 7, at 984–85.

²⁷ *See generally* Alisa Smith, *It's My Decision, Isn't It?*, 6 VIOLENCE AGAINST WOMEN 1384, 1395–96 (2000) (explaining that a large percentage of battered women would not seek medical attention after an episode of domestic violence if there was a requirement that they report the abuse).

²⁸ *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 50 (1985).

people in a situation.²⁹ Men, on the other hand, approach problem solving from an “ethic of justice,” that is, they seek to provide moral rules to dictate one just outcome.³⁰ Furthermore, the law devalues the ethic of care in judicial proceedings, favoring adversarial, rights-based reasoning.³¹ Feminists argue that the ethic of care should be brought into the justice system to address women’s needs.³² The incorporation of the ethic of care is precisely what this note suggests that restorative justice can provide, through victim-offender mediation for rape and domestic violence.

A. Restorative Justice as an Alternative

Mediation is a voluntary process that is characterized by the presence of a third party to administer negotiations, the outcome of which is controlled by the parties in dispute.³³ Parties attempt to reach a compromise, with the outcome putting parties in a better position than they could *both* achieve through the adversarial, judicial model.³⁴ Restorative justice is a system of mediation used to address crime, with the victim and the community at the forefront of the process.³⁵ Traditionally, criminal law has been retributive and concerned with “offenders and their relation to the law.”³⁶ Restorative justice compels the offender to attempt to provide restoration for the damages he has caused the victim by allowing the victim, offender, and community to participate in shaping the most restorative remedy possible.³⁷

²⁹ CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 62–66 (1982).

³⁰ *Id.*

³¹ See Grillo, *supra* note 12, at 1601; Menkel-Meadow, *supra* note 28, at 46.

³² Menkel-Meadow, *supra* note 28, at 46–47 (applying Gilligan’s model to the justice system, and arguing that the judicial system should take into account both approaches to problem solving); see also M. Kay Harris, *Moving into the Millennium: Toward a Feminist Vision of Justice*, 67 PRISON J. 27, 27–38 (1987) (arguing that the reasoning from an ethic of care standard should be infused into the justice system).

³³ E.g., MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH xxxviii–xix (2001).

³⁴ *Id.*

³⁵ JOHN PERRY, REPAIRING COMMUNITIES THROUGH RESTORATIVE JUSTICE 6–7 (2002).

³⁶ *Id.*

³⁷ John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 5 (Michael H. Tonry & Norval Morris eds., 1999); see also STRANG, *supra* note 5, at 25–35.

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

Victim Offender Mediation (VOM) is a type of restorative justice that takes place in lieu of a trial when the offender has acknowledged his guilt.³⁸ The process allows all parties to express their emotions and opinions on the crime.³⁹ The offender will attempt to repair the damage he has caused without serving a period of incarceration, and the court will dispose of the case when an agreement is reached.⁴⁰ However, if the agreement breaks down, the case will return to court.⁴¹ Generally, VOM consists of four stages: "Intake, Preparation for Mediation, Mediation, and Follow-up."⁴² This structure allows mediators to determine whether mediation is appropriate between the parties and allows for monitoring after the process, remanding to the courts any violation of VOM terms.⁴³ Proponents of VOM argue that the benefits (among many) of the process include: allowing victims and communities to participate in resolving their own harms rather than focusing on the harm of "rule-breaking" against the state, measuring success in a progressive way by focusing on repair rather than on punishment, diffusing responsibility to find a solution and prevent further infraction on the community, and tailoring the criminal process to remedy the unique harms to the victim and prevent recidivism of the offender in a meaningful, individualized way.⁴⁴

In the United States, this type of restorative justice is not common and is very rarely applied to address gendered violence.⁴⁵ As noted, Mary P. Koss

³⁸ See Delgado *supra* note 12, at 756–57; see also UMBREIT, *supra* note 33, at xxviii–xxix (describing the conceptual differences between criminal trials and victim offender mediation).

³⁹ Delgado, *supra* note 12, at 756–57.

⁴⁰ Hopkins & Koss, *supra* note 1, at 697.

⁴¹ *Id.*

⁴² Delgado, *supra* note 12, at 756; see also UMBREIT, *supra* note 33, at 35–58.

⁴³ Delgado, *supra* note 12, at 757.

⁴⁴ See STRANG, *supra* note 5, at 1–24; BARBARA A. HUDSON, UNDERSTANDING JUSTICE: AN INTRODUCTION TO IDEAS, PERSPECTIVES AND CONTROVERSIES IN MODEL PENAL THEORY 77–92 (2d ed. 2003); Braithwaite, *supra* note 37, at 5; PERRY, *supra* note 35, at 1–7; Restorative Justice Online, <http://www.restorativejustice.org/intro/tutorial/benefits> (last visited April 15, 2009).

⁴⁵ For examples of applied Restorative Justice, see V.E. van der Does, *Negotiating Mediation: Aims and Obstacles Introducing Legislative Instruments on Mediation in Criminal Cases at European Union Level* (2006) (unpublished M.A. thesis), <http://www.law.kuleuven.ac.be/cals/eurcrim/papers/> (follow "2005–2006" hyperlink; then follow "paper" hyperlink) (last visited April 15, 2009); Judge FWN McElrea, *Restorative Justice and Sexual Abuse—A New Zealand Perspective* (paper presented at the Symposium of the Australian & New Zealand Association for the Treatment of Sexual Abusers in April of 2004), available at <http://www.restorativejustice.org/resources/docs/mcelreal17>.

has formed a revolutionary research demonstration project, RESTORE, through which rape victims may seek to address the offense through restorative justice.⁴⁶ In Koss's program, the victim addresses the offender face to face, accompanied by a community support network, and describes the wrongful impact it has had on her life.⁴⁷ Participants implement a plan through which the offender may redress the wrong, and if the plan is not successful, the case is referred back to the prosecutor.⁴⁸ The benefits of such a program, and of VOM, are numerous as seen through the lens of several different feminist frameworks. First, restorative justice meets the unique needs of gendered violence, giving special treatment to the victim and the underlying social forces that distinguish it from non-gendered crimes.⁴⁹ Furthermore, restorative justice addresses concerns of cultural feminists, focusing on the violence caused to people and their relationships, rather than to the "abstract state."⁵⁰ In a sense, restorative justice uses the ethic of care approach rather than the ethic of justice which has always characterized the formal, judicial process.⁵¹ Restorative justice also aims at dominance feminist concerns about the centrality of sexual violence in the large-scale

⁴⁶ Hopkins & Koss, *supra* note 1 at 696.

⁴⁷ *Id.* at 697.

⁴⁸ *Id.*

⁴⁹ See CHAMALLAS, *supra* note 7, at 39–43 (describing feminist movements advocating special treatment of women by the law, since women do not start out on equal footing with men in our society); Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOLOGIST 1332, 1338 (2000) (describing how communitarian approaches, like mediation, "address systemic and personal aspects of male violence").

⁵⁰ Hopkins & Koss, *supra* note 1, at 700. For an example of cultural feminism in legal studies, see generally GILLIGAN, *supra* note 29, at 62–66 (describing how women approach moral situations from an ethic of care, prioritizing their relationships and care for others, while men approach situations from an ethic of justice, prioritizing rights and universal, ethical principles); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (describing how women's values, such as intimacy and relationship, are not represented in the structure of our legal system, and arguing that they should be incorporated). Cultural Feminists investigate the different approaches between men and women in approaching moral dilemmas and argue that the law should recognize, or value the two distinct reasoning processes. See CHAMALLAS, *supra* note 7, at 53–60. The female voice, or way of reasoning, is referred to as "the ethic of care," while the male voice is called the "ethic of justice." GILLIGAN, *supra* note 29, at 63.

⁵¹ See GILLIGAN, *supra* note 29, at 63 (first using the term "ethic of care"); see generally Menkel-Meadow, *supra* note 28, at 46–47 (applying Gilligan's model to criticize the legal system as structured around male values); see also CHAMALLAS, *supra* note 7, at 57–58 (delineating legal feminist applications of Gilligan's theory of a "different voice" to the judiciary).

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

domination of women by addressing the role of sexual violence in the community.⁵²

Restorative justice aims to break down the polarization of victim and offender, and “insists that survivors and responsible parties be viewed as something other than predetermined caricatures of victim and offender.”⁵³ In addition, the RESTORE program is designed to mediate racism and monitor outcomes of mediation to prevent reinforcement of racial norms in mediation.⁵⁴

Restorative justice also has the potential to address the unique psychological needs of those involved in a rape,⁵⁵ and to decrease intense anxiety and negative feelings that parties to a rape often experience in trial.⁵⁶ In fact, restorative justice allows the parties to express emotions that might not be relevant to the trial system’s “rule of law” approach, so that parties may gain a sense of acceptance of the event.⁵⁷ Restorative justice can give the victim a sense of control by facilitating recovery rather than retribution.⁵⁸ Regaining self-control is an important step in the recovery of rape victims.⁵⁹ Because the communitarian aspect of restorative justice diffuses blame for a crime across the community by addressing societal causes of crimes, restorative justice diminishes the need for rape offenders to minimize guilt by attempting to shift blame to the victim, as they do with defense tactics in a trial setting.⁶⁰ In addition, restorative justice examines the rationale of the

⁵² For an explanation of dominance feminism applied to legal studies see generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987). Dominance feminists argue that equal treatment of women preserves the status quo of gender inequality, and that sometimes special treatment is necessary to put women on the same footing as men. CHAMALLAS, *supra* note 7, at 44. Doing so interrupts the legal system’s tendency to perpetuate male domination. *Id.* at 45.

⁵³ Hopkins & Koss, *supra* note 1, at 702.

⁵⁴ *Id.* at 706.

⁵⁵ See Koss, *supra* note 49, at 1338 (describing how mediation is a supportive and accommodating forum for victims of gender violence); ROBIN WEST, *CARING FOR JUSTICE* 101 (1997) (describing the damage that rape does to a woman’s autonomy in asserting her own interests); E.J. Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 *VICTIMOLOGY* 95, 103 (1984) (discussing the personal harm of rape and desire for privacy in dealing with a rape).

⁵⁶ See Goolsby, *supra* note 10, at 1203 (describing how mediation may reduce negative feeling experienced in a rape trial).

⁵⁷ See *id.* at 1201; STRANG, *supra* note 5, at 18–23.

⁵⁸ Goolsby, *supra* note 10, at 1203.

⁵⁹ *Id.*

⁶⁰ Koss, *supra* note 49, at 1339; see also Snow, *supra* note 17, at 255–56 (describing trial defense tactics in rape trials).

event, in working to prevent future occurrences with the assistance of the community, targeting the root of sexual violence in the community.⁶¹ And finally, the process may facilitate the offender's apology to the victim, which many victims desire in the aftermath of sexual assault.⁶² Perhaps these positive characteristics of restorative justice would allow more victims to report sexual assault, by eliminating the effects of the adversarial model that deter them from doing so.⁶³

The benefits of restorative justice do not apply as clearly to cases of domestic violence. While the benefits of restorative justice identified by the different feminist frameworks still exist, the continued threat of physical and psychological danger is more prominent in cases of domestic violence.⁶⁴ However, there is some evidence that restorative justice may work alongside the retributive process to improve mechanisms of justice for domestic violence victims.⁶⁵ For example, the Navajo justice system has successfully used restorative justice to address domestic violence.⁶⁶ Furthermore, one study indicated that restorative justice "builds on the sanctions [that] abusive men said they fear most."⁶⁷ "Only a minority of batterers feared criminal punishment or job loss (36% and 27%, respectively). Instead, they believed that the major cost of domestic violence arrest would be self-stigma, family stigma, and broad social disapproval."⁶⁸ Restorative justice also allows abusive behavior to be treated as wrongful, not just lawful or unlawful, leading to a greater recognition and acceptance of responsibility on the part

⁶¹ Koss, *supra* note 49, at 1339; Hopkins & Koss, *supra* note 1, at 700–01.

⁶² Koss, *supra* note 49, at 1339.

⁶³ See generally *id.* at 1338 (describing restorative justice as creating a "space for her [the victim's] story to be heard"); Goolsby, *supra* note 10, at 1184–85 (describing how the stressful experience of a trial, including the shifting of blame and the experience of being questioned at trial are reasons for which victims do not report rape).

⁶⁴ Hopkins & Koss, *supra* note 1, at 711–12.

⁶⁵ Koss, *supra* note 49, at 1337.

⁶⁶ See generally Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999). Coker investigated the use of informal adjudication of Navajo Peacemaking, a system much like mediation in which a designated Peacemaker, who is familiar with Navajo traditions, holds a session including the victim and offender in a domestic violence relationship, and the families of the parties. *Id.* at 6. Coker generally thought the system had positive results, fostering antisubordination dialogue between the parties and families and intervening in the domestic violence system in a meaningful way. *Id.*

⁶⁷ Koss, *supra* note 49, at 1338.

⁶⁸ *Id.*; Kirk R. Williams & Richard Hawkins, *The Meaning of Arrest for Wife Assault*, 27 CRIMINOLOGY 163, 172 (1989).

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

of the perpetrator.⁶⁹ While restorative justice provides options of redress to victims of gendered violence, there potential dangers that may decrease its effectiveness in such situations.

B. Critiques of Restorative Justice

Not only might restorative justice fail to achieve the goals that proponents expect, but also certain characteristics of restorative justice, when applied to gendered violence, might actually make the aftermath of the violence worse.⁷⁰ Some critics also worry that rather than addressing harmful social norms, restorative justice will incorporate them into the mediation process itself.⁷¹ The goal of this note is to address some of the criticisms concerning restorative justice by suggesting the use of ODR in certain contexts. The criticisms *and* purported benefits of restorative justice are many, and range from attacks on the theoretical underpinnings to concerns about access.⁷² Since it would be impossible to address every one of these arguments in this note's discussion of ODR, the following sections will identify some aspects of restorative justice that the use of ODR might either eradicate or ameliorate.

III. EXPANDING AND IMPROVING RESTORATIVE JUSTICE THROUGH ODR

Online dispute resolution is simply any form of ADR which takes place on the internet.⁷³ In online mediation, the parties to the mediation are

⁶⁹ Koss, *supra* note 49, at 1338.

⁷⁰ Daly & Stubbs, *supra* note 11, at 17. The authors draw from a wide range of research and list the main criticisms to be: victim safety; manipulation of the process by offenders; pressure on victims; the role of the community; mixed loyalties of family and friends; minimal impact on the offender; and the implication that behavior is not bad enough to be punished by justice system. *Id.* This note only discusses those criticisms that can potentially be cured by ODR, but the Daly and Stubbs article above provides a comprehensive analysis of the criticisms of restorative justice and gendered violence. *Id.*

⁷¹ See *id.*; see also Amy Cohen, *Gender: An (Un)Useful Prescriptive Negotiation Analysis?*, 13 TEX. J. WOMEN & L. 169, 176–77 (2003) (citing Deborah Kolb, *The Shadow of Negotiation: What we can Learn From Studying Gender*, Lecture at Harvard Law School Interdisciplinary Research Seminar on Negotiation & Dispute Resolution (November 8, 2001)). Men and women choose gendered ways of negotiating, which prevents women from attaining equality in negotiation. *Id.*

⁷² See generally Hopkins & Koss, *supra* note 1 (supporting restorative justice); Daly & Stubbs, *supra* note 11, at 17 (criticizing restorative justice).

⁷³ ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 2* (2001).

physically separate, unlike traditional mediation, where the physical presence of the disputants and mediator is central to the mediation process.⁷⁴ However, the effect of separation of the parties depends largely on the extent to which the medium of ODR simulates face-to-face negotiation.⁷⁵ “Mediation exists on a continuum from face-to-face, to pure online mediation,”⁷⁶ that is, online mediation can involve anything from emails, chat sessions, cyber courts, to video conferencing that simulates a traditional mediation session.⁷⁷ In most cases, the neutral third party may still control the verbal and nonverbal cues in order to facilitate peaceful and productive negotiation.⁷⁸

The foundational elements necessary for successful ODR are: convenience, trust, expertise, and, of course, technology.⁷⁹ While ODR theorists created this model with civil suits in mind, the core values⁸⁰ apply equally well to further the potential advantages of restorative justice delineated by feminists.⁸¹ If ODR is not convenient, and the system does not provide the expertise necessary to negotiate between victim and offender, ODR will offer little improvement to the status quo.⁸² Furthermore, a trustful and supportive environment, which is essential to successful dispute resolution, is also crucial in communicating with a victim of rape.⁸³ It is

⁷⁴ *Id.* at 10.

⁷⁵ Llewellyn Joseph Gibbons et al., *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M. L. REV. 27, 43 (2002).

⁷⁶ *Id.*

⁷⁷ See GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE 21–23 (2004); Robert Gordon, *The Electronic Personality and Digital Self*, 56 DISP. RESOL. J. 8, 11 (2001).

⁷⁸ KATSH & RIFKIN, *supra* note 73, at 136; *but see* KAUFMANN-KOHLER & SCHULTZ, *supra* note 77, at 11–14 (explaining that “assisted negotiation,” which is a form of ODR, does not employ a third party at all in commercial transactions and other less intimate relationships between parties). This method is not appropriate in restorative justice nor in cases of gendered violence, where third party and community intervention is key, but it is worth noting. *Id.*

⁷⁹ KATSH & RIFKIN, *supra* note 73, at 94.

⁸⁰ *See id.*; UMBREIT, *supra* note 33, at 35–64 (explaining the tasks and goals of the mediator in communicating with a victim and an offender).

⁸¹ *See* Daly & Stubbs, *supra* note 11, at 18 (describing the potential advantages of restorative justice under several feminist frameworks).

⁸² Hopkins & Koss, *supra* note 1, at 696. RESTORE is a “pilot research project,” as there is a lack of restorative justice programs in the United States, and little opportunity to address sex crimes outside of the formal justice system. *Id.*

⁸³ *See* Cynthia R. Mabry, *African Americans “Are Not Carbon Copies” of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 426 (1998) (describing the importance of trust in

important that a victim does not feel that a mediator questions her credibility and reputation, or mediation will do little to lessen the negative experience of the criminal rape trial.⁸⁴ Therefore, the goals of restorative justice are in line with the goals of ODR systems used thus far.

Some limits of ODR include: the inability for parties to observe the nonverbal communication of the mediator and the parties, the ambiguous identity of the parties involved in the dispute, and concerns about privacy on the internet.⁸⁵ However, these limits can be controlled, and may become advantages in some situations.⁸⁶ For example, the increased understanding and use of technology in society allows the mediator to use their mediation skills over the internet.⁸⁷ A mediator can quickly learn what kind of language is effective in computer text, and can still “actively listen” by asking the kinds of questions a mediator would ask in a face-to-face situation.⁸⁸ While nonverbal cues are absent from the ODR process, perhaps obfuscating the meaning and emotion behind certain communications, the delays in communication may have a positive effect on the mediator’s role, allowing parties “to retract messages sent in haste, to cool off and to respond after a moment’s thought.”⁸⁹ “[P]arties will have more opportunity to think about their disputes and to respond in a manner that will promote resolution to the dispute. . . .”⁹⁰ A mediator can easily block counterproductive messages that violate the “ground rules” for the mediation process before they reach the other party, and work with a party to reframe language.⁹¹ In addition,

allowing participants to “speak more freely and discuss any issues” and how distrust causes participants to be “passive or nonverbal.”); *see also* Patricia Yancey Martin, *Gender, Accounts, and Rape Processing Work*, 44 *SOCIAL PROBLEMS* 464, 471 (1997) (mentioning comfort and trust as essential elements in communicating with rape victims); *see generally* Koss, *supra* note 49, at 1338–39 (emphasizing the necessity of a safe and supportive forum for women to confront sexual violence).

⁸⁴ *See generally* Goolsby, *supra* note 10, at 1184 (criticizing how victims must defend their credibility in rape trials and suffer invasions of privacy).

⁸⁵ *See* KATSH & RIFKIN, *supra* note 73, at 148–49.

⁸⁶ *Id.*; Braeutigam, *supra* note 14, at 289–91; *see also* Joseph W. Goodman, *The Advantages and Disadvantages of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 9 *J. INTERNET L.* 1, 12 (2006).

⁸⁷ KATSH & RIFKIN, *supra* note 73, at 149–53; *see* David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 *OHIO ST. J. ON DISP. RESOL.* 629, 657–60 (2006).

⁸⁸ KATSH & RIFKIN, *supra* note 73, at 151–53.

⁸⁹ KAUFMANN-KOHLER & SCHULTZ, *supra* note 77, at 23.

⁹⁰ Gibbons et al., *supra* note 75, at 43.

⁹¹ KATSH & RIFKIN, *supra* note 73, at 154; *see* KAUFMANN-KOHLER & SCHULTZ, *supra* note 77, at 23; *see also* Braeutigam, *supra* note 14, at 298–99 (discussing the

stringent privacy policies can assure that mediation communications are kept confidential,⁹² and procedural rules can “provide for an explicit duty of confidentiality on the part of participants in all mediation proceedings and define its contents.”⁹³ Most of the development in ODR has taken place in the area of commercial dispute resolution, beginning with the famous eBay system, which used ODR to help online buyers and sellers settle their disputes.⁹⁴ However, there has been some investigation of ODR as a useful forum for resolving family disputes.⁹⁵

The following analysis examines the potentially positive results of combining these characteristics of ODR with restorative justice in cases of gendered violence.

A. *Preferable Forms of Online Mediation*

Both restorative justice and ODR are relatively new, revolutionary concepts in United States jurisprudence, so there are few data to support speculations over what form of ODR would work best for gendered violence.⁹⁶ As noted above, ODR can take the form of any online communication including emails, text messaging, video conferencing, or a combination of ODR and face-to-face meetings.⁹⁷ Parties in the commercial setting have developed ways of choosing the best form of interaction for their

valuable opportunity for mediators to filter overly emotional communications in family law proceedings).

⁹² KATSH & RIFKIN, *supra* note 73, at 159.

⁹³ KAUFMANN-KOHLER & SCHULTZ, *supra* note 77, at 52 (noting that “[f]or the mediation to be successful . . . parties [must] communicate freely with the mediator without withholding information potentially detrimental to their case. They will only do so if the mediator can make a credible promise to keep the information confidential.” *Id.* at 50).

⁹⁴ See Ethan Katsh et al., 15 OHIO ST. J. ON DISP. RESOL. 705, 708–09 (2000).

⁹⁵ Braeutigam, *supra* note 14, at 280; Richard Michael Victorio, *Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century*, 1 PEPP. DISP. RESOL. L.J. 279, 285 (2001); THOMAS SHULTZ ET AL., ONLINE DISPUTE RESOLUTION: THE STATE OF THE ART AND THE ISSUES 2 (2001), available at www.online-adr.org/reports/TheBlueBook-2001.pdf; see Richard S. Granat, *Creating an Environment for Mediating Disputes on the Internet: A Working Paper for the NCAIR Conference on On-Line Dispute Resolution*, 3 (1996), <http://www.mediate.com/articles/granat.cfm> (last visited April 19, 2009).

⁹⁶ See Braeutigam, *supra* note 14, at 275–76. Though the concept of ODR is new, the kind and number of disputes taken online will increase. *Id.*

⁹⁷ Gibbons et al., *supra* note 75, at 30.

particular disputes.⁹⁸ For example, for small consumer conflicts on eBay, simple email mediations have worked well, whereas parties in complex negotiation have required videoconferencing techniques.⁹⁹ The level of personal interaction appropriate for different types of disputes is an important factor that a mediator should consider in selecting an internet forum.¹⁰⁰ However, the kind of ODR this note pictures throughout this analysis, except where noted, is modeled after the “chat room,” but is also subjected to the filters and delays of the mediation system.¹⁰¹ The “chat room” model emulates face-to-face meetings more than emails do, but retains physical and mental separation of the parties to a dispute, or the “role of the screen.”¹⁰² The “chat room” model for ODR includes different threads for different topics, separate and restricted conversations between the mediator and parties when necessary, and easy storage of the mediation record.¹⁰³ The mediator can either observe exchanges between the parties, guide the conversation by asking questions, or serve as a filter between the parties, in order to screen abuse of the system.¹⁰⁴ All participants should receive prior instruction and opportunity to practice with the technology before use to minimize disparities and discomfort with different levels of technology competence.¹⁰⁵ This is not to say that other forms of ODR are never appropriate for the mediation considered in this note, but this is the principal form of ODR that this note considers while constructing the pros and cons of the process for mediation of gendered violence. As technology develops new forms of

⁹⁸ Braeutigam, *supra* note 14, at 275.

⁹⁹ KATSH & RIFKIN, *supra* note 73, at 140–41.

¹⁰⁰ *Id.* at 136.

¹⁰¹ *Id.* at 141. The authors describe the mediation process on-line as “screen-to-screen” as opposed to the basic “chatroom.” When traditional chat rooms are used in mediation “mediators have found that they are rushed, pressured to respond quickly, and less able to control the flow of information among disputants.” *Id.*; see Anne-Marie G. Hammond, *How Do You Write “Yes”? A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RESOL. Q. 261, 275–76 (2003) (discussing an ODR experiment using the modified chat room as a tool for mediation, and the various controls and characteristics of the chatroom that can facilitate mediation).

¹⁰² See KATSH & RIFKIN, *supra* note 73, at 141 (discussing the “role of the screen” in facilitating communication, and the benefits of “screen to screen” communication); Braeutigam, *supra* note 14, at 295.

¹⁰³ Hammond, *supra* note 101, at 264.

¹⁰⁴ Braeutigam, *supra* note 14, at 295; KAUFMANN-KOHLER & SHULTZ, *supra* note 77, at 23.

¹⁰⁵ Hammond, *supra* note 101, at 264; see KAUFMANN-KOHLER & SCHULZ, *supra* note 77, at 149 (arguing that facilitating simplicity of use is essential for a successful ODR session).

internet communication, innovative mediators may find ways to tailor them to gendered violence.¹⁰⁶

B. Access and Cost

The most obvious benefit of ODR, accepting the benefits of restorative justice, is that restorative justice programs can be widely available to victims of crime in the United States.¹⁰⁷ RESTORE is a unique, “pilot” project, and it is unlikely that programs like it will be established in most locations anytime soon.¹⁰⁸ Clearly, if restorative justice is available online, it will be widely accessible. While not everyone has easy access to the internet: “more than 200 million people worldwide communicate on the Internet . . . [s]ome individuals access the Internet through educational institutions, employers, and public libraries; but most users access the Internet at home through an Internet Service Provider (ISP).”¹⁰⁹ Easy internet access is not universal, but it is available to *most* Americans, if not at home, through institutions accessible to the public.¹¹⁰ The ability of advancing technology, specifically the medium of videoconferencing, to simulate real-life encounters may make programs like RESTORE available to anyone who has access to the internet, in a way that closely simulates face-to-face mediation.¹¹¹ Videoconferencing, especially, has great potential to expand women’s ability to choose how to address gendered violence through live mediation, regardless of geographic location.¹¹²

Furthermore, ODR greatly reduces the costs of mediation, by eliminating travel costs, legal costs, and sometimes, legal counsel.¹¹³ It logically follows that the cost of establishing restorative justice centers in many communities is also eliminated if people can access the process online. All of these things are beneficial to women (especially minority women and poor women), who

¹⁰⁶ Braeutigam, *supra* note 14, at 297–98 (noting the speed at which ODR is being adapted to encompass different kinds of disputes).

¹⁰⁷ Hopkins & Koss, *supra* note 1, at 696 (noting that RESTORE is a revolutionary project in the United States).

¹⁰⁸ *Id.*

¹⁰⁹ Gibbons et al., *supra* note 75, at 29–30.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 33–34.

¹¹² See KATSH & RIFKIN, *supra* note 73, at 42.

¹¹³ KAUFMANN-KOHLER & SCHULTZ, *supra* note 77, at 55–56.

have historically had fewer economic resources than white men, and are often victims of gendered violence.¹¹⁴

C. *Physical Threat/Perceived Violence*

While face-to-face encounters are probably the richest experiences of human interaction¹¹⁵ and are usually preferable in ADR, there are some situations in which such a meeting is not feasible.¹¹⁶ One of these situations occurs when the continued threat of violence between a victim and perpetrator makes restorative justice too dangerous to attempt.¹¹⁷ For this reason the RESTORE project only involves cases of acquaintance rape, as those sorts of victim-offender relationships do not involve the systemic pattern of violence that domestic violence does, since most “acquaintance rapes are relatively isolated.”¹¹⁸ In fact, most legal scholars who address domestic violence in mediation advise strongly against *ever* allowing mediation, even for civil matters, when there is a possibility that domestic violence has occurred between the parties.¹¹⁹ Victims of domestic abuse are

¹¹⁴ See generally CHAMALLAS, *supra* note 7 at 25–33 (describing women’s historical exclusion from the public sphere and discrimination in the workforce); *Id.* at 223 (describing rape as a substantial safety threat for women).

¹¹⁵ Braeutigam, *supra* note 14, at 289; Gibbons et al., *supra* note 75, at 37 (describing how mediums of communication can range from “rich” to “lean,” depending on how personable the experience is. ODR is purported to be “leaner” because it does not support non-verbal cues).

¹¹⁶ See Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 361–66 (1999). Mediation creates a heightened risk of violence toward victims because the domestic violence system is so pervasive that the abuser may not be able to control future violence. *Id.* at 366. “Studies have found that there is more abuse following a mediation than there is following a trial,” because the mediation system does not have a protection system in place, and the victims attempt to assert her rights can trigger more violence. *Id.*

¹¹⁷ See *id.*; Hopkins & Koss, *supra* note 1, at 709; Daly & Stubbs, *supra* note 11, at 17 (listing victim safety as the primary feminist criticism of restorative justice for gendered violence).

¹¹⁸ Hopkins & Koss, *supra* note 1, at 709.

¹¹⁹ See Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 180–87 (2003); Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34, 35–36 (1995) (describing why many believe that mediation is inappropriate when there is a history of domestic violence between the parties); see also Loomis, *supra* note 116, at 366 (pointing out that domestic violence victims experience retaliation after mediation more often than they do after trials).

generally at the greatest risk of violence by their attackers after they have asserted independence, left, or reported the abuse.¹²⁰ Furthermore, mediation may allow an abusive spouse the first chance of contact with his battered wife since separation.¹²¹ Even though it may seem intuitively unlikely that a batterer would carry out violence against a victim in the presence of mediators and other third parties, even Koss concedes that the encounter creates a “logistical opportunity for further acts of violence against the victim.”¹²² “For those who have worked with survivors of domestic violence and have witnessed batterers use formal court proceedings as opportunities for continued abusive conduct, this concern is obvious and real.”¹²³ If batterers will attempt violence during a formal court proceeding, it is implausible to believe that the informal environment of mediation will dissuade them from doing the same.

Furthermore, it is not only the actual threat of physical violence that might interfere with restorative justice during a face-to-face encounter, but the perceived violence by the victims of gendered violence.¹²⁴ Feminist scholars have long recognized that because of the female experience in our society, women may perceive situations of inequality as intimidating violence where it may seem an unlikely consequence to a male perceiver.¹²⁵ A study

¹²⁰ Loomis, *supra* note 116, at 366; see also Rene Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 98 (2001); Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2133–37 (1993).

¹²¹ CHAMALLAS, *supra* note 7, at 257. Battering is often triggered or increased in response to a woman’s acts of independence, or when women attempt to assert autonomy. *Id.* For example, “women are often forced to leave jobs and training programs and go back on welfare when the men in their lives pressure or intimidate them because the men are jealous of the freedom.” *Id.*; see Rimelspach, *supra* note 120, at 98; SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT* 220, 224 (1982).

¹²² Hopkins & Koss, *supra* note 1, at 709.

¹²³ *Id.* For other examples of batterer’s willingness to assault his wife in public, see KATHERINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 499–501 (4th ed. 2006) (discussing how men will use the knowledge of a woman’s workplace to inflict further abuse on her); *Stevenson v. Stevenson*, 714 A.2d 986 (N.J. Super. Ct. Ch. Div. 1998) (where a man, in a rage, choked his wife in front of a neighbor’s house and dragged her down the street).

¹²⁴ Daly & Stubbs, *supra* note 11, at 17; Rimelspach, *supra* note 120, at 98; Fischer et al., *supra* note 120, at 2161–62.

¹²⁵ See MACKINNON, *supra* note 16, at 62–63; MACKINNON, *supra* note 52, 109 (discussing how differently perpetrators and victims of sexual harassment perceive the behavior); Catharine A. MacKinnon, *Feminist, Marxism, Method, and State: Toward*

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

of mediation participants in South Australia showed that female victims tended to be frightened by the presence of their offender, and even female victims of property damage feared retaliation by offenders.¹²⁶ Another study of participants in divorce mediation showed that “44% of the reasons given by women who rejected mediation services offered to them centered around their mistrust of, fear of, or desire to avoid their ex-spouse.”¹²⁷

If the presence of the offender causes fear on the part of the victim, there is no way that the victim can participate meaningfully in the mediation process—one that is supposed to provide both parties the ability to mediate on equal terms.¹²⁸ Furthermore, the absence of lawyers in restorative justice may further reduce the victim’s ability to advocate her own interests in a face-to-face meeting, where she is fearful of the other party, since lawyers can advocate for the victim who is too fearful to assert her own rights.¹²⁹

While these proscriptions do not indicate that there will ever be a feasible role for restorative justice in addressing domestic violence, it is possible that ODR could provide such a medium.¹³⁰ Of course, face-to-face encounters provide a richer communication experience than online communication,¹³¹ but there may be instances when ODR would be the only possibility for administering restorative justice.¹³² While some may consider domestic violence to be outside of the scope of restorative justice, and more appropriately addressed through prosecution, it is important to remember that many victims of domestic violence are unwilling to prosecute their attackers

Feminist Jurisprudence, 8 SIGNS 635, 655–56 (1983); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1205–09 (1989).

¹²⁶ Daly & Stubbs, *supra* note 11, at 15–16.

¹²⁷ Grillo, *supra* note 12, at 1601.

¹²⁸ *Id.* at 1600–01; Loomis, *supra* note 116, at 364–65; see Ver Steegh, *supra* note 119, at 184; Fischer et al., *supra* note 120, at 2157–71 (arguing that participating in the mediation process might be very difficult for a victim of spousal abuse “because she may not even understand her position, may have been consistently silenced by her partner, and may fear the consequences of speaking out.”). Further, the task of negotiating an agreement runs a grave risk of simply mimicking the “battering culture.” *Id.* at 2161.

¹²⁹ See Hopkins & Koss, *supra* note 1, at 712.

¹³⁰ See generally Braeutigam, *supra* note 14, at 292–97 (discussing how ODR can eliminate physical manifestations of bargaining power between unequal parties as some aspects of the inflammatory interactions that can occur in person).

¹³¹ KATSH & RIFKIN, *supra* note 73, at 9; Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. REV. 1305, 1311 (1998).

¹³² See generally Rimelspach, *supra* note 120, at 98 (discussing the dangers of any other form of mediation involving contact and implying that it is not an option).

because of concerns about publicity, privacy, and family preservation.¹³³ Perhaps victims of domestic violence who would like to address the problem, without having to experience the polarizing adversarial system, would resort to restorative justice.¹³⁴

While there is substantial concern that pursuing restorative justice would jeopardize a victim's future safety, because the offender will not be incarcerated, a particular restorative justice outcome might require the offender to experience psychological care, or other remedies that might diminish this concern, including productive community involvement.¹³⁵ Of course, there must be special safeguards and screening techniques to make sure that such a process does not further jeopardize a victim's safety, but perhaps there are some instances where some action is better than no action.¹³⁶ There are some examples of successful domestic violence intervention systems by the Navajo Peacemaking Processes; thus, it appears that mediation may be effective in addressing at least some domestic violence.¹³⁷ In fact, studies have shown that abusive partners tend to be deterred more effectively by the threat of "self-stigma, family stigma, and broad societal disapproval."¹³⁸ By eliminating real and perceived physical threat between victim and offender in cases where it exists, ODR might allow restorative justice where there was previously no other option to address the wrong.

The emerging technology of videoconferencing constitutes a form of ODR that may even simulate face-to-face interactions while eliminating the actual and perceived threat of violence.¹³⁹ While videoconferencing is still an

¹³³ LENORE E. WALKER, *THE BATTERED WOMAN* 22–31 (1979).

¹³⁴ Holly Joyce, Comment, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIMONIAL LAW. 447, 456–58 (1997). Mediation "can provide a supportive, empowering environment for women who in many cases have been stripped of their identity, dignity, and self-esteem." *Id.* at 458. The mediation system offers a less adversarial option for victims, and mediators can "break the cycle of abuse" by targeting the root of the problem, rather than focusing on dichotomous law. *Id.* at 456–58.

¹³⁵ MARTIN WRIGHT, *JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME* 92–99 (1991).

¹³⁶ Koss, *supra* note 49, at 1338 (referring to necessary preventative measures to ensure victim safety during the mediation process, from requiring a corrective officer to observe the mediation process, to maintaining an active arrest warrant in case the abuser violates the mediation agreement and terms).

¹³⁷ See generally Coker, *supra* note 66 (describing the merits of Navajo Peacemaking, a form of restorative justice, as applied to wife battering).

¹³⁸ Koss, *supra* note 49, at 1338; Williams & Hawkins, *supra* note 68, at 170–72.

¹³⁹ Gibbons et al., *supra* note 75, at 33–34.

expensive form of communication, through the advancement of technologies that simulate face-to-face meetings¹⁴⁰ and the public's growing familiarity with the use of technology,¹⁴¹ ODR will become even more feasible as a way to mediate domestic violence when there is no other way to address the wrong.

"Hybrid Mediation" is a form of mediation that combines face-to-face mediation with online mediation.¹⁴² Therefore, mediators may even be able to develop innovative ways to combine the two mediums to provide optimum safety and effectiveness in mediation.

D. Psychological and Social Problems with Restorative Justice

Face-to-face mediation does not only present the potential for physical danger, but also threatens psychological damage.¹⁴³ In addition, social norms may infect the mediation process, skewing the outcome of restorative justice.¹⁴⁴

1. Restorative Justice and Gender

While mediation promises the opportunity for parties involved to more freely express their emotions about the offense than in the adversarial setting,¹⁴⁵ gendered expectations and norms will constrain the actual ability for parties to express certain emotions in public.¹⁴⁶ Some of the strongest proponents of restorative justice suggest that women will enter into mediation and suddenly have equal bargaining power with men, just because of the process.¹⁴⁷ However, mediation is not necessarily the opposite of the

¹⁴⁰ *Id.*

¹⁴¹ See Larson, *supra* note 87, at 657–59 (explaining that increased understanding of technology by the public, evinced in the ease and familiarity with which younger generations use it, will make ODR a more appropriate form of ADR in the near future).

¹⁴² Gibbons et al., *supra* note 75, at 63; see also Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-Mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 239–45 (2004) (discussing how "small talk," or casual phone conversations preceding or accompanying email negotiations reduced hostility and contributed to the success of ODR).

¹⁴³ Grillo, *supra* note 12, at 1601.

¹⁴⁴ *Id.*

¹⁴⁵ Gibbons et al., *supra* note 75, at 43. Freedom of body language and the lack of requirement need for decorum and tranquility is an advantage of ODR. *Id.*

¹⁴⁶ Grillo, *supra* note 12, at 1572.

¹⁴⁷ Cohen, *supra* note 71, at 174–75.

so-called patriarchal trial system, because it involves the same shared expectations of the “right” way of acting as do everyday interactions.¹⁴⁸ In fact, “mediation can be destructive to many women and some men because it requires them to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be.”¹⁴⁹ Societal norms and expectations of gender do not disappear inside the mediation room because none of the parties themselves can be completely immune to social norms.¹⁵⁰ For example, there is an expectation that women will approach problems and disputes from an ethic of care, or a “relational” standpoint, which can skew the outcome of mediation.¹⁵¹ This means, that rather than protecting their own interests, women will try to solve disputes in a way that maximizes the happiness for all parties involved, having difficulty even recognizing that they have self-interests.¹⁵² Furthermore, the more personal the setting, the more women tend to “doubt their positions,” “are adverse to recognizing and advocating for their own interests,” and “are overly concerned that all the parties to a negotiation leave feeling satisfied.”¹⁵³ Separation theory describes how women socially develop around a forced connectedness with others, while men solve social problems in a more separationist or egotistical manner.¹⁵⁴ Because women focus on their connections with others rather than on their own, separate interests, they may have trouble problem solving in their own interests in the mediation setting.¹⁵⁵ When women focus primarily on their connectedness with other parties and focus on preserving relationships, they are undoubtedly harmed in the mediation which is meant to achieve balance by allowing *both* parties an

¹⁴⁸ See Grillo, *supra* note 12, at 1555–56.

¹⁴⁹ *Id.* at 1549–50.

¹⁵⁰ For a discussion of how culture necessarily characterizes interactions in mediation, taking into account gender, ethnicity, age, language, and class, see Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER SOC. POL’Y & L. 269, 273 (1996).

¹⁵¹ Grillo, *supra* note 12, at 1601; see Menkel-Meadow, *supra* note 28, at 46–47.

¹⁵² WEST, *supra* note 55, at 285. West states that:

what women experience on a daily basis is not a socially constructed *selfhood*, but rather a socially constructed *lack* of self, a sense of selflessness. Put another way, women distinctively bear the mark of patriarchal power by denying rather than acting upon (even if that action takes the form of renouncing) their pleasures, and internalizing and identifying with rather than avoiding their pains.

Id.

¹⁵³ Cohen, *supra* note 71, at 179.

¹⁵⁴ See WEST, *supra* note 55, at 47.

¹⁵⁵ Grillo, *supra* note 12, at 1577–78.

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

opportunity for self advocacy.¹⁵⁶ “If she [the woman] is easily persuaded to be cooperative, but her partner is not, she can only lose.”¹⁵⁷ Furthermore, women suffer in confrontational situations when they are not insulated by a lawyer.¹⁵⁸

Female victims are especially vulnerable in the physical presence of abusers and revert to a more avoidant position on issues.¹⁵⁹ The mediation process can be uniquely dangerous for victims of gendered violence by exacerbating the already present relationship of fear and coercion between the parties.¹⁶⁰ Because of the unique power dynamics between a victim and an offender, some “victims [will be] unable to hold their own in a face-to-face meeting.”¹⁶¹ In addition to social norms of how women and men should act, domestic violence adds another set of mutually understood rules about how the abuser and victim will act toward one another within the relationship.¹⁶² Abused women take on a learned pattern of selflessness, while the batterer believes that violence is justified as a way to achieve his personal needs.¹⁶³ While the victim believes that she has no right to advocate her own interests and that doing so is against “the rules,” the abuser believes that he is justified in using violence as a way of preserving the “order” within the relationship.¹⁶⁴ Once again, the absence of attorneys in the restorative justice process makes it more likely that a victim will consequently agree to terms to which she might not otherwise agree in a less confrontational environment.¹⁶⁵

¹⁵⁶ *Id.* at 1603.

¹⁵⁷ *Id.* Grillo describes a hypothetical woman, Emma, who is forced to mediate with an abusive husband who she is divorcing. She is:

asked to undergo a forced engagement with the very person from whom she is trying to differentiate herself at a difficult stage in her life. She may find it impossible to think of herself as a separate entity during mediation, while her husband may easily be able to act on behalf of his separate self. “When a separate self must be asserted, women have trouble asserting it. Women’s separation from the other in adult life, and the tension between that separation from our fundamental state of connection, is felt most acutely when a woman must make choices, and when she must speak the truth.”

Id. at 1604 (internal citations removed).

¹⁵⁸ See Cohen, *supra* note 71, at 179.

¹⁵⁹ Daly & Stubbs, *supra* note 11, at 16.

¹⁶⁰ See Fischer et al., *supra* note 120, at 2161–62.

¹⁶¹ Hopkins & Koss, *supra* note 1, at 712.

¹⁶² Fischer et al., *supra* note 120, at 2126; see also Loomis, *supra* note 116, at 359.

¹⁶³ WALKER, *supra* note 133, at 45–46.

¹⁶⁴ See Fischer et al., *supra* note 120, at 2164.

¹⁶⁵ Grillo, *supra* note 12, at 1599.

ODR provides women with an increased sense of separation and insulation that is often lacking in the mediation setting.¹⁶⁶ Because a woman in general is harmed by the absence of an attorney to insulate her interactions with her former abuser, the physical separation of ODR can provide necessary insulation between the victim and offender.¹⁶⁷ In fact, physical separation may be a more effective insulation than an attorney because the victim does not have to rely on another person to achieve a sense of separation, and can therefore gain a sense of independence, which is important for rape victims.¹⁶⁸ For a victim who wishes to affirm her separation from the offender by addressing him in a safe environment but also wants a chance to tell her side of the story, ODR provides a perfect and unique opportunity to do so.¹⁶⁹

For rape victims, the experience of rape causes the victim to see a constant threat of further violence from the rapist and from others.¹⁷⁰ Among the many types of harm that rape causes its victims, some scholars argue that the biggest harm is “the threat to women’s autonomy.”¹⁷¹ Some rape victims experience a feeling of continued, forced connection with their rapists.¹⁷² One survivor claims to have felt as though she shared her fate “not with the girls and boys I grew up with, or the students I went to Syracuse with, or even the friends and people I’ve known since. I share my life with my rapist. He is the husband to my fate.”¹⁷³ In the aftermath of a sexual assault, the lack of individualism caused by the invasion of her autonomy may make it difficult for a woman to assert her own interests, adding to the difficulties that women already face in confrontation.¹⁷⁴ For a rape victim, “the will to act on one’s own pleasures, desires, or interests—to act in a way that furthers

¹⁶⁶ Braeutigam, *supra* note 14, at 293–95 (recognizing the positive nature of added distance when there is a negative history between parties).

¹⁶⁷ Grillo, *supra* note 12, at 1599.

¹⁶⁸ JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC VIOLENCE TO POLITICAL TERROR* 65 (1997) (describing the importance of autonomy for rape victims); *see* Grillo, *supra* note 12, at 1599.

¹⁶⁹ *See* Koss, *supra* note 49, at 1338–39.

¹⁷⁰ Martha Chamallas, *Lucky: The Sequel*, 80 IND. L.J. 441, 469 (2005); *see* WEST, *supra* note 55, at 101–02.

¹⁷¹ WEST, *supra* note 55, at 101.

¹⁷² *See id.*

¹⁷³ ALICE SEBOLD, *LUCKY* 53 (1999); *see also* Chamallas, *supra* note 170, at 448 (using the significance of this quote to demonstrate the alienation and changed perspective that inflicts rape victims).

¹⁷⁴ *See* SEBOLD, *supra* note 173, at 53 (describing her rapist as the “husband to her fate” and stating “I share my life with my rapist.”); *see also* Chamallas, *supra* note 170, at 448.

one's own security, secures one's own well-being, or 'maximizes' one's safety—may have quite simply been beaten out of her.”¹⁷⁵ Because of the power dynamics inherent in gender violence, it is unlikely that she will be able to assert her own interests against him in a face-to-face session.¹⁷⁶

The insulation of physical “non-presence” also has the power to disrupt unique control devices of the abuser in the domestic violence system.¹⁷⁷ There may be many situations when the mediator is unaware that an abuser is attempting to coerce or intimidate the victim, thereby controlling the mediation, through their “use of words or movements known only to the victim as being threatening.”¹⁷⁸ Physical separation of the parties can eliminate the abuser's abilities to manipulate the session through physical movements.¹⁷⁹ Although the possibility of coercive words is still present, there is no longer the possibility for threatening language inflection.¹⁸⁰ Just as scholars suggest for traditional mediators, online mediators should receive extensive training in recognizing abusive language between parties in order to prevent it and should balance individual conversations with the victim with joint sessions with the abuser.¹⁸¹ This allows the mediator to monitor the effect that the mediation is having on the victim and allows the mediator to communicate with the victim without any possibility of manipulation by the abuser.¹⁸² Online mediation facilitates mediator intervention into potential attempts by the abuser to manipulate the victim by allowing

¹⁷⁵ WEST, *supra* note 55, at 104.

¹⁷⁶ See Daly & Stubbs *supra* note 11, at 17; see generally Grillo, *supra* note 12, at 1600 (describing process dangers of mediation by using a hypothetical involving an abusive relationship); Braeutigam, *supra* note 14, at 293–95 (recognizing the positive nature of added distance when there is a negative history between parties).

¹⁷⁷ See Ver Steegh, *supra* note 119, at 152–53 (explaining that abusive relationships develop cycles that culminate toward violence, consisting of patterns of the party's responses to one another).

¹⁷⁸ Loomis, *supra* note 116, at 364–65; see also Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is it the Light at the End of the Tunnel or is a Train on the Track?*, 70 N.D. L. REV. 255, 267 (1994) (explaining how a hand gesture or even a blink can have “velocity, force, and coercive power” to intimidate the victim of domestic violence). Expert mediators are trained on how to recognize these sorts of subtle signals between parties. See *id.* at 268.

¹⁷⁹ Braeutigam, *supra* note 14, at 293 (highlighting that ODR allows “freedom from body language”).

¹⁸⁰ See *id.*

¹⁸¹ See Grillo, *supra* note 12, at 1592 (describing how a “mediator can recognize power disparities when they occur and intervene to lessen their impact.”).

¹⁸² See KATSH & RIFKIN, *supra* note 73, at 153.

instantly restricted conversations if any party feels the need.¹⁸³ The mediator can also review messages before they travel from party to party, using the mediator's expertise on abusive language to review and filter such language.¹⁸⁴ Coupled with the obvious decrease in physical danger when parties are separate, the "role of the screen" as insulation can greatly reduce the potential for victim intimidation during mediation.¹⁸⁵

Furthermore, women will not be compelled to hide emotions that are stereotypically "unfeminine" as much as if they are physically present at a mediation session.¹⁸⁶ The physical meeting of parties can heighten the need to suppress anger in expression and tone.¹⁸⁷ During online mediation, women are free to express their anger in the privacy of their homes or outside the view of the other party.¹⁸⁸ Without the constant pressure to appear cooperative, women may be encouraged to assert their own interests and also feel free to confront their abusers, without having to worry about losing their composure in the public eye.¹⁸⁹ And finally, men, who have been found to suppress emotion during mediation, especially the urge to cry, are free to do so during online mediation.¹⁹⁰ In general, online mediation facilitates the general goals of retributive justice by allowing heightened self-expression and encouraging recognition of the emotional impact of the crime.

2. Restorative Justice and Race

While this discussion is focused on gender violence, it is important to understand that gender and race *both* affect societal norms and intersect in the way that they create prejudices.¹⁹¹ Legal feminists recognize that the

¹⁸³ See *id.* at 151 (mentioning the ability of the mediator to "intervene if and when on or both parties hurl insults" and to "use the telephone to address some of these potential difficulties.")

¹⁸⁴ See *id.*; see also KAUFMANN-KOHLER & SHULTZ, *supra* note 77, at 23.

¹⁸⁵ See KATSH & RIFKIN, *supra* note 73, at 154.

¹⁸⁶ See Grillo, *supra* note 12, at 1576–78 (explaining that women are conditioned to suppress anger, and that society expects women to behave in a cooperative way during mediation).

¹⁸⁷ See *id.*

¹⁸⁸ See generally Braeutigam, *supra* note 14, at 293 (highlighting that ODR allows "freedom from body language").

¹⁸⁹ See, e.g., *id.*; Grillo, *supra* note 12, at 1576–78.

¹⁹⁰ See Menkel-Meadow, *supra* note 28, at 41 (explaining that men are reluctant to appear sensitive in public because they are stereotyped as feminine).

¹⁹¹ See generally Maxine Baca Zinn & Bonnie Thornton Dill, *Theorizing Difference from Multiracial Feminism*, 22 FEMINIST STUD. 321 (1996) (providing a good

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

Women's Movement has traditionally left minority women out of the picture, and that its goals focus on white women.¹⁹² Legal processes fail to address the unique experiences of black women who suffer sexual harassment and tend to force them "to choose between being a woman and being a minority."¹⁹³ Both black women *and* men have suffered from stereotypes about sexual behavior and sexual crimes.¹⁹⁴ Historically, common law presumed that women of color could not be forcibly raped, due to racist conceptions of women of color as promiscuous or unchaste.¹⁹⁵ These stereotypes also insinuate that sexual harassment is "welcomed" by minority women.¹⁹⁶ On the other hand, stereotypes against black men have labeled them as sexually dangerous to white women and likely to commit acts of sexual violence against them.¹⁹⁷ These racial stereotypes about rape still characterize the way society perceives sexual violence narratives. For example:

foundational explanation of multiracial feminism and the intersectionality of race, class, and gender).

¹⁹² See Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1472–74 (1992); see also Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–140 (1989) [hereinafter Crenshaw, *Demarginalizing*]; Grillo, *supra* note 12, at 1579–80; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

¹⁹³ Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 540 (1989); see CHAMALLAS, *supra* note 7, at 246–50 (discussing the unique dilemma that Anita Hill faced in the Hill-Thomas Hearings. The public discredited Hill because she had to overcome two stereotypes—racism and sexism—and ultimately credited Thomas' "antiracist rhetoric," over Hill's harassment claims, which were complicated by conflicting stereotypes); see also Kimberlé Crenshaw, *Whose Story Is It, Anyway: Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402 (Toni Morrison ed., 1992).

¹⁹⁴ See Harris, *supra* note 192, at 600.

¹⁹⁵ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1266 (1991); see also ABBY L. FERBER, *WHITE MAN FALLING: RACE, GENDER, AND WHITE SUPREMACY* 108 (1998); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 40 (2000); Karin S. Portlock, Note, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1409–14 (2007) (arguing that excluding evidence of prostitution from the coverage of rape shield laws codifies historical prejudice against black women in rape prosecutions).

¹⁹⁶ See CHAMALLAS, *supra* note 7, at 83.

¹⁹⁷ See Harris, *supra* note 192, at 600; see also FERBER, *supra* note 195, at 105.

[T]he media is more sympathetic to the victim when a rape occurs between an upper middle class white woman and an African-American assailant. In contrast, if the allegation involves a rapist who is white or from a higher class, the media tends to place more blame on the lower class, minority victim.¹⁹⁸

These stereotypes tend to inhibit fair enforcement and policy initiatives against rape and sexual harassment in a way that harms black men and women.¹⁹⁹ Furthermore, domestic violence is also perceived as being more common among poor, black families.²⁰⁰

These racist perceptions are even more critical when parties turn to restorative justice because its informal nature may give rise to inappropriate, prejudicial behavior by parties who might otherwise act fairly in the courtroom.²⁰¹ "In less formal settings, the same individuals who will behave with fairness during occasions of state will feel much freer to tell an ethnic joke or deny a person of color or a woman a job opportunity."²⁰² Mediators tend to be middle-class persons who have little in common with diverse parties, and mediation standards are based on white, middle-class norms.²⁰³ Informal adjudication is not only rife with biases against minorities, but minorities actually have less confidence in informal systems.²⁰⁴ Therefore, even if a mediator is not racially biased, a minority offender or victim might perceive a risk that they will be because:

Minorities recognize that public institutions, with their defined rules and formal structure, are more subject to rational control than private or informal structures. Informal settings allow wider scope for the participants' emotional and behavioral idiosyncrasies; in these settings majority group members are most likely to exhibit prejudicial behavior [. . .] This perception becomes self-fulfilling: minority persons are encouraged to

¹⁹⁸ Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 243–44 (2006) (arguing that coverage of the alleged rape of an African American stripper by Duke lacrosse players exemplifies media perceptions of race and sexuality); see also Joanne Ardovini-Brooker & Susan Caringella-MacDonald, *Media Attributions of Blame and Sympathy in Ten Rape Cases*, 15 JUST. PROF. 3, 3 (2002).

¹⁹⁹ See Kosse, *supra* note 198, at 243–44.

²⁰⁰ CHAMALLAS, *supra* note 7, at 264–65.

²⁰¹ Delgado, *supra* note 12, at 766–67.

²⁰² *Id.* at 766.

²⁰³ See *id.* at 767–68; Irving, et al., *supra* note 12, at 325–26.

²⁰⁴ See Delgado, *supra* note 12, at 767–68; Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391 (1985).

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

pursue their legal rights as though prejudice were unlikely and thus the possibility of prejudice is in fact lessened.²⁰⁵

The lack of trust in restorative justice that minorities might experience is detrimental to the foundational element of "trust" in ODR.²⁰⁶ Furthermore, prejudice tends to be more prevalent when confrontation is direct, rather than through intermediaries.²⁰⁷ ODR has the potential to limit prejudice that may arise in the context of mediation and restorative justice in several ways.

First, the lack of physical presence may allow the race of some parties, and some mediators, to remain ambiguous and play less of a role in the parties' interactions. Minimizing conscious and subconscious stereotyping is important in resolving claims of gender violence, where race often triggers stereotypes about the victim and offender in such situations.²⁰⁸ While the race of the victim and offender may already be known to one another, the race of the mediator may remain ambiguous if they are not physically present.²⁰⁹ The appearance of the mediator may send certain racial messages to parties before negotiations begin, and "[b]ecause of their distrust and suspicion, African American participants may 'check[] out [the white mediator's]...appearance, race, skin color, clothing, perceived social class, language, and a range of more subtle cues'" to assess trustworthiness.²¹⁰ Furthermore, the race of the parties will remain ambiguous to the mediator.²¹¹ Unfortunately, though mediators attempt to be neutral, "[u]nconscious and unfounded stereotypes may influence the mediator's perception of a disputant and that perception may be manifested in negative, nonverbal undertones."²¹² By separating the parties and not requiring them even to see one another, ODR can eliminate stereotypes based on appearance as well as subconscious body language.²¹³ "In intercultural mediations, eye

²⁰⁵ Delgado et al., *supra* note 204, at 1391; *see also* Mabry, *supra* note 83, at 420–21.

²⁰⁶ KATSH & RIFKIN, *supra* note 73, at 93–94; Mabry, *supra* note 83, at 424–25.

²⁰⁷ Delgado et al., *supra* note 204, at 1402.

²⁰⁸ *See* Crenshaw, *Demarginalizing*, *supra* note 192, at 149.

²⁰⁹ *See* Braeutigam, *supra* note 14, at 296–98. Anonymity, along with blindness to another's age, race, gender, sex, or social status, is an equalizing force in ODR. *Id.*

²¹⁰ *See* Mabry, *supra* note 83, at 425–26 (quoting NANCY BOYD-FRANKLIN, *BLACK FAMILIES IN THERAPY: A MULTISYSTEMS APPROACH* 96 (1989)).

²¹¹ Braeutigam, *supra* note 14, at 296–98.

²¹² Mabry, *supra* note 83, at 428.

²¹³ *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131, 1133–34 (2000) (describing an experience where the author created an online avatar of another race and was subjected to racial epithets).

contact and body language can be misinterpreted.”²¹⁴ In addition, cultural speech patterns can symbolize a lack of cooperation to a party who does not understand them.²¹⁵ ODR removes the opportunity for the misinterpretation of body language and speech patterns.²¹⁶ Although language barriers may still exist in a typewritten negotiation, the mediator has a better opportunity to screen and reframe statements, perhaps minimizing the effect of cultural misunderstanding.²¹⁷ Mediators are somewhat more likely to identify prejudice and counteract it because of their training and commitment to neutrality, and though everyone is subject to cultural biases, a mediator can at least suppress uninhibited biases of opposing parties.²¹⁸ In addition, mediators are encouraged to learn the idiosyncrasies of different cultural languages, so they may be able to reframe and screen communication very effectively during the delays of online mediation.²¹⁹

ODR has the ability to cause actual and perceived diversity in the class of mediators that parties deal with, since the mediation process would no longer be confined to one geographic area.²²⁰ It logically follows that online mediation programs can recruit a diverse group of mediators, even if there is a high population density of a certain race where the parties reside. “Increasing diversity among mediators would provide additional perspectives as to how to increase effectiveness of mediation in the face of differences in value orientations.”²²¹ Not only would actual diversity allow for more effective mediation, but also when cultural groups perceive a more culturally friendly system, racial minorities will feel more confident and trusting in advocating for themselves.²²² These diversity steps that ODR can accomplish, can diminish the stereotypes and prejudices that skew the

²¹⁴ Mabry, *supra* note 83, at 433.

²¹⁵ *Id.* at 29–31 (“Silence itself is also a powerful form of linguistic discrimination, especially when lack of response or long delays may repress or abort communication.”).

²¹⁶ Braeutigam, *supra* note 14, at 293–98.

²¹⁷ *Id.* at 295; KAUFMANN-KOHLER & SHULTZ, *supra* note 77, at 23.

²¹⁸ See Braeutigam, *supra* note 14, at 293–94; See AM. ARBITRATION ASSOCIATION MODEL STANDARDS OF CONDUCT FOR MEDIATORS § II (2005) (stating that if a mediator cannot be impartial they should decline to mediate).

²¹⁹ See Mabry, *supra* note 83, at 431–34.

²²⁰ See *supra* part III.B.

²²¹ Savage, *supra* note 150, at 291.

²²² See Mabry, *supra* note 83, at 420–35.

ONLINE DISPUTE RESOLUTION IN THE MIDST OF GENDERED VIOLENCE

outcome of mediation, especially in the often racialized perceptions of a victim and offender of sexual violence.²²³

IV. CONCLUSION

With any attempt to respond to the crimes based upon complicated systems of gender and racial domination, there are risks and complications. Neither ODR nor VOM guarantees victim vindication, abuser deterrence, or safety for the parties involved. However, the goal of this note is to add to the scholastic discourse that is directed at finding alternative resources for victims of sexual violence. Though the use of ODR pushes the envelope in the realm of current criminal justice, and even mediation, the process presents promising possibilities for reaffirming victim autonomy, increasing victim safety, and reducing the effect of harmful gender and racial norms in the judicial process.

²²³ See Delgado, *supra* note 12, at 767 (describing how parties bring preexisting prejudices to the mediation table); FERBER, *supra* note 195, at 37–39 (discussing the myth of black men's desire to rape white women in white supremacist discourse).

